IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 286 of 1985
and
INCOME TAX REFERENCE No 287 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

PANNA KNITTING INDUSTRIES

Appearance:
MR BB NAIK with MR MANISH R BHATT for Petitioner
MR RK PATEL & MR BD KARIA for Respondent

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE M.S.SHAH

Date of decision: 05/12/2000

COMMON ORAL JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

These two reference cases are being decided by this common order as the same were decided by the Tribunal by a common order.

The following common question of law in the two reference cases has been referred for our opinion :-

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the Commissioner of Income-tax has no jurisdiction to pass order under section 263 of the Income-tax Act, 1961 ?"

In the assessment case of the year 1979-80 of the two assessee companies herein, weighted deduction under Section 35B was allowed in relation to three items, but it was disallowed on item `Export Freight'. Aggrieved by the order of the Assessing Officer, the assessee went in appeal under Section 251 of the Act before the Commissioner of Appeals. The Commissioner of Appeals, however, confirmed the order of the Income-tax Officer disallowing the assessee's claim of weighted deduction under Section 35B in relation to item No. 1 i.e. Export Freight. The Commissioner of Income-tax, however, initiated revisional proceedings under Section 263 of the Act as, according to him, weighted deduction under Section 35B of the Act was wrongly allowed by the Income-tax Officer in respect of item Nos. 2, 3 and 4 such as Foreign Travelling, Export Service Charges and Export Commission. The Commissioner of Income-tax passed an order directing the Income-tax Officer to withdraw the weighted deduction allowed in respect of items 2 to 4 described above.

Being aggrieved by the order of the Commissioner of Income-tax, the assessee went in appeal before the Tribunal. There was difference of opinion between the two members of the Tribunal and the matter was referred to the third member on the question of maintainability of revisional proceedings for withdrawing the weighted deduction in respect of the items mentioned above. By majority opinion, the Tribunal came to the conclusion that the Commissioner of Income-tax had no jurisdiction to exercise revisional powers under Section 263 of the Act as the order of the Assessing Officer had merged in the appellate order.

It is on the above facts that the above quoted question of law has been referred to this Court.

On behalf of the revenue, learned counsel Mr Bharat Naik relies strongly on the decision of the Supreme Court in the case of CIT vs. Shri Arbuda Mills Ltd., 231 ITR 50. He points out that explanation (c) has been added by amendment to Section 263 of the Income Tax Act purposely to meet objections similar to one raised by the assessee in this case. Explanation (c) which has been quoted and relied by the Supreme Court in case of Shri Arbuda Mills Ltd. (Supra) reads as under :-

> "Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,- ... .
>
> (c) Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after June 1, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

The learned counsel appearing for the assessee made an effort to distinguish the decision of the Supreme Court by contending that here the question was claim of weighted deduction under Section 35B of the Act. On three items, the deduction was allowed. It was disallowed only on one item. The assessee had gone up in appeal under Section 251 against disallowance of weighted deduction in respect of only one item. The powers of the appellate authority under Section 251 are co-extensive with the powers of the assessing authority and the appellate authority in exercise of his powers could have withdrawn the weighted deduction allowed for the remaining three items. In such a situation, the learned counsel contends, the revisional powers could not have been exercised. A distinction is sought to be drawn on the opinion of the Supreme Court in case of Shri Arbuda Mills (Supra) stating that there were various items of deduction and depreciation claimed by the assessee under different sections of the Income Tax Act and in those circumstances the Supreme Court referred to explanation (c) in Section 263 for coming to the conclusion that the theory of merger of the order of assessing authority in the order of the appellate authority could not be applied. We do not find any such distinction as is sought to be pointed out by the counsel for the assessee in the opinion of the Supreme Court in the case supra.

It is true that the powers of the appellate

authority under Section 251 are co-extensive with the powers of the assessing authority and the former authority had power to even withdraw the allowance of weighted deduction in respect of the aforesaid three items. The legislature has, however, by incorporating explanation (c) to Section 263 of the Act conferred power on revisional authority which are co-extensive with the powers of the appellate authority. In is only with a view to empower revisional authority to exercise powers of the appellate authority in respect of such matters which have escaped attention of the appellate authority that explanation (c) to Section 263 has been added to protect the interest of the revenue. The Supreme Court decision in case of Shri Arbuda Mills Ltd. (Supra) squarely covers the question referred to us and it is, therefore, answered in favour of the revenue and against the assessee.

The references are accordingly disposed of with no order as to costs.

(D.M. Dharmadhikari, CJ)

(M.S. Shah, J.)

sundar/-